80-542

Supreme Court, U. S.
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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1979

DIANNA SCHNEIDER,

Petitioner,

VS.

STATE OF ARKANSAS

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

ROBERT S. BLATT
Attorney at Law
P.O. Box 1825
Fort Smith, Arkansas 72902
Telephone: (501) 785-2923

WHIT PATE
Attorney at Law
P.O. Box 785
Poteau, Oklahoma 74953
Telephone: (918) 647-3200

Attorneys for Petitioner

QUESTION PRESENTED

In State Court revocation of probation proceedings, is it constitutionally permissible for the State to revoke such probation with evidence obtained through the use of a search and seizure conducted in violation of the Fourth Amendment to the United States Constitution?

OPINIONS BELOW

The opinion of the Supreme Court of Arkansas is reported in 269 Ark. 245 (Advance Sheets). It is set forth in Appendix "A" to the Petition.

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IN THE

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OCTOBER TERM, 1979

DIANNA SCHNEIDER,

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STATE OF ARKANSAS

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

The Petitioner, Dianna Schneider, petitions this Court for a Writ of Certiorari to review the final order of the Supreme Court of Arkansas entered July 7, 1980, denying a Petition to Review the Opinion and Decision of the Supreme Court of Arkansas entered June 16, 1980, affirming the Sebastian County Circuit Court judgment entered August 1, 1979, sentencing Petitioner to five (5) years imprisonment upon revocation of her probation on a sentence imposed on January 25, 1977, after she had pleaded Nolo Contendere on a charge of Unlawful Possession of Controlled Substance.

Petitioner submits this Petition and argument to show that the United States Supreme Court should accept this case because a substantial Federal question is raised, involving thousands of people in this country, some who go to the penitentiary and some who do not go, depending upon the fortuitous circumstances of which State they happen to have been placed on State probation.

JURISDICTION

The final order and opinion of the Supreme Court of Arkansas was entered June 16, 1980, denying a Petition to Review the opinion and decision of the Supreme Court of Arkansas entered June 16, 1980, affirming the judgment of the Sebastian County Circuit Court entered August 1, 1979, sentencing Petitioner to five (5) years in the Department of Corrections for Possession of a Controlled Substance. The sentence of August 1, 1979, was upon revocation of probation of a sentence imposed January 25, 1977.

Notice of filing for Writ of Certiorari to Review was filed in the Arkansas Supreme Court on June 25, 1980. A Motion to Stay the Mandate of the Arkansas Supreme Court and to remain on bond was filed in the same Court on June 25, 1980. On July 7, 1980, the Arkansas Supreme Court entered an order granting Petitioner's Motion to Stay the Mandate and to remain on bond pending filing for Petition for Writ of Certiorari with the United States Supreme Court.

The jurisdiction of the United States Supreme Court to review this decision by Petition for Writ of Certiorari is conferred by 28 U.S.C.A. §1257.

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

The Provisions of the United States Constitution involved are Amendments 4 and 14.

Amendment 4 provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment 14, §1 provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

STATEMENT OF CASE

On January 25, 1977, Petitioner was placed on probation in Arkansas State Court after having pleaded Nolo Contendere to the charge of Unlawful Possession of Controlled Substance.

On February 3, 1979, in keeping with the directions of a Search Warrant issued by an Arkansas State Court the house in which Petitioner was living was searched. This search turned up the presence of Marijuana, Firearms, and Money.

Subsequently, the State of Arkansas applied for revocation of Petitioner's probation. Petitioner filed timely Motions to Suppress the Evidence obtained through the search, contending the Affidavit in support of the Search Warrant was constitutionally defective. The Arkansas State Court refused to suppress the evidence and at a hearing conducted August 1, 1979, admitted such evidence at the revocation of probation hearing and revoked Petitioner's probation sentencing her to five (5) years.

Upon appeal, the issues were briefed and presented to the Arkansas Supreme Court. A divided Arkansas Supreme Court held the Affidavit upon which the Search Warrant was issued was not constitutionally defective. The Arkansas Supreme Court did not reach the issue of whether the exclusionary rule is applicable to probation revocation proceedings. A dissenting opinion said the fruits of the Search should have been excluded from the hearing because the Search was constitutionally defective and that the Court should either hold the exclusionary provisions of the Fourth Amendment not applicable in cases relating to the revocation of probation or reverse and remand the case for further consideration.

ARGUMENT

Rule 19 of this Court, provides that one of the reasons this Court will grant review on Writ of Certiorari, is where a State Court has decided a Federal question of substance, not heretofore determined by this Court. In that whether or not the exclusionary rule should apply in State Court probation revocation proceedings involves thousands of people in this country and some languish in penitentiaries and some are on the streets, simply because some State Courts grant their people the protection of the Fourth Amendment to the Constitution and other State Courts do not grant this protection, would certainly seem to raise a "Federal question of substance". This Court last had an opportunity to grant Certiorari and decide the question herein presented in 1971. It chose not to do so. *U. S. ex rel Lombardino v. Heyd,* (1970, D.C. La) 318 F.Supp. 648, AFFD. (CA 5 La) 438 F.2d 1027, Cert. Den. 404 U.S. 880, 30 L.Ed. 2d 160, 92 S.Ct. 195.

As of today, apparently eleven states hold the exclusionary rule does not apply in State revocation of probation proceedings and evidence obtained in violation of the Fourth Amendment to the United States Constitution is admissible at a hearing on revocation and may be used to place the accused in the penitentiary. On the other hand, four states take the position that evidence obtained by an unreasonable Search and Seizure is not to be used for any purpose in the courts of this land and hold that such evidence may not be used by the State in a probation revocation hearing.

The instant case vividly illustrates the irony of the situation and points up the ludicrous state of things where the United States Constitution appears to be shaped as an

irregular umbrella conforming to State lines. Fort Smith, Arkansas, is located on the Arkansas-Oklahoma line. The house subjected to the Search and in which Petitioner was living is located in Arkansas less than a mile and one-half from that State line. Had Petitioner's home been located one and one-half miles West in the State of Oklahoma, then Oklahoma, which applies the exclusionary rule in such matters would have held the evidence obtained as a result of the unreasonable Search and Seizure not admissible against Petitioner because of the Fourth Amendment to the Constitution, and Petitioner would likely be a free woman. *Michaud v. State,* (1973 Okla. Crim.) 505 P.2d 1399.

If this Court should decide to review this question on Writ of Certiorari, it will have no problem getting to the question notwithstanding the majority opinion of the Arkansas Supreme Court's holding the Search and Seizure involved here not unreasonable. Even a cursory reading of the Affidavit in support of the Search Warrant, which Affidavit is part of the Appendix to this Petition, readily discloses that such Affidavit does not even start out to meet the requirements of *Aguillar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723 (1964) and *Spinelli v. U. S.*, 393 U.S. 410, 89 S.Ct. 584, 2 L.Ed. 2d 637 (1968). A copy of the Affidavit on which the Search Warrant was founded is set forth in Appendix "B" to this Petition for Certiorari.

At 77 ALR 3rd 636, there is an excellent annotation covering the point herein raised. The States of California, Colorado, Florida, Illinois, Indiana, Maine, Montana, New Hampshire, Pennsylvania, Rhode Island, and Washington permit the use of such tainted evidence in revocation proceedings. The States of Georgia, North Carolina, Oklahoma, and Texas do not. Apparently, eight of these States that hold such evidence admissible notwithstanding the Fourth

Amendment have decided the question since this Court last had an opportunity to pass on it in 1971.

CONCLUSION

In view of the admitted fact, that the State Courts are split and divided on what is a substantial Federal question involving thousands of people in this country we urge this Court to grant this Petition and to decide the question herein presented. Petitioner believes, of course, that the reasoning of the Oklahoma Court excluding such evidence from revocation hearings should become the law of the land. Whatever, and whether this Court ultimately holds for the Petitioner herein or not, it is a substantial Constitutional question that can only be decided by this Court. Whatever this Court's decision on the point might be, people in this country will know that the Constitution of the United States is going to be equally applied throughout the United States, and whether or not they go to the penitentiary does not depend on a State line insofar as Constitutional issues are concerned.

Respectfully submitted,

ROBERT S. BLATT
Attorney at Law
P.O. Box 1825
Fort Smith, Arkansas 72902
Telephone: (501) 785-2923

WHIT PATE
Attorney at Law
P.O. Box 785
Poteau, Oklahoma 74953
Telephone: (918) 647-3200

Attorneys for Petitioner

APPENDIX "A"

SUPREME COURT OF ARKANSAS

No. CR 80-52

DIANNA SCHNEIDER,

Appellant,

VS.

STATE OF ARKANSAS,

Appellee.

Opinion Delivered June 16, 1980

APPEAL FROM SEBASTIAN CIRCUIT COURT

DAVID PARTAIN, *Judge*

AFFIRMED

JOHN A. FOGLEMAN, *Chief Justice*

Appellant Dianna Schneider was sentenced to five years' imprisonment upon revocation of her probation on a sentence imposed on January 25, 1977, after she had pleaded nolo contendere on a charge of unlawful possession of controlled substances. On her appeal she asserts three errors, one of which questions the sufficiency of the evidence. Two of them question the propriety of the trial court's denial of her motions to suppress evidence. We find no merit in them and affirm.

The prosecuting attorney filed a petition to revoke Ms. Schneider's probation, alleging that she had violated the terms of her probation in that she had, on February 3, 1979, committed the offense of possession of marijuana

with intent to deliver, that, during her probationary period, she had actively engaged in the selling of marijuana and other drugs, and that she had committed the offense of possession of a firearm by a felon. It was on this petition that the probation was revoked, after a hearing before the trial judge.

We will not consider her points for reversal in the order they were argued; instead, we will first consider her motion to suppress the evidence of a telephone conversation, allegedly with her.

Detective Glen Yates, of the Narcotics Division of the Fort Smith Police Department, and other police officers arrested William Rhodes and Phillip Bruce at about 4:15 p.m. on February 3, 1979, for sales of marijuana, and took them to the police department where they were interrogated. Apparently, Rhodes and Bruce implicated Ms. Schneider as the source of their supply. Bruce, upon the urging of Detective Yates, placed a telephone call, which was recorded on tape. This recording disclosed a conversation by Bruce with a person who answered to the name Dianna and whose voice was identified by Yates as that of appellant. It tended to incriminate her as a supplier of marijuana. The trial judge, after having denied a motion to suppress the evidence of this conversation, considered it, along with other evidence, in finding that Ms. Schneider had violated the terms of her probation.

It was asserted by appellant that the telephone conversation was intercepted without the consent of either of the parties to it, and, consequently, was inadmissible because of 18 USC 2511(c), which makes the interception of such a conversation lawful, if one of the parties has given his prior consent. The state contends that Bruce did con-

sent, but appellant counters that the consent was not voluntarily given. The evidence on this point is somewhat conflicting. Yates testified that Bruce agreed to make the telephone call 10 to 15 minutes prior to its being made and that Bruce was told, before the call was placed, that the conversation would be recorded and probably used in court. He said that Bruce appeared normal, but a little frightened, due to the fact that he had been arrested. Yates stated that he noticed nothing unusual about Bruce's demeanor, and that Bruce showed no signs of having lost control of his "facilities" by reason of having taken marijuana or LSD. He said that Bruce exhibited none of the classical symptoms of being under the influence of LSD. He stated that Bruce had no objection to the recording of the conversation and that no promises were made to him that things would go lighter with him if he would cooperate. Yates said that Bruce was advised that everything he did would be reported to the prosecutor's office.

Bruce testified that he made the telephone call at the suggestion of Yates but consented to its being recorded only because Yates told him the recording would be made so the officers could hear it and it would never leave the room in which it was made. Bruce said that he did not think he would have made the call if he had not been promised it would not be used. He also said that he was promised that the officers would talk to the prosecuting attorney for him, and that Yates promised to try to get the prosecuting attorney to go easy on him. Bruce testified that, at the time, he was under the influence of LSD and marijuana and was laughing and shaking uncontrollably, but did not hallucinate. He did not remember whether he had any problem talking. He said that he was willing to get out of the jam any way he could.

The trial judge specifically found that Bruce had voluntarily consented to the recording of the telephone call. Assuming, without deciding, that Congress can adopt an exclusionary rule in this field governing the state courts, we are unable to say that the trial judge erred. It has been held that a defendant who contends that the caller's consent was obtained through a hope for leniency has the burden of establishing that consent was not voluntary by showing that the informer's will was overcome by threats or improper inducement amounting to coercion or duress. *United States v. Hodge,* 539 F.2d 898 (6 Cir.), cert. denied sub nom *Robertson v. United States,* 429 U.S. 1091, 97 S.Ct. 1100, 51 L.Ed. 2d 536 (1977). It has been said that, even though it is unlikely that one would permit the police to intercept a conversation unless he expected something from the police in return, the consent is not involuntary, so long as pressure is not initiated by the police for the purpose of overbearing the will of the party. *United States v. Osser,* 483 F.2d 727 (3 Cir.), cert. denied 414 U.S. 1028, 94 S.Ct. 457, 38 L.Ed. 2d 321 (1973); *United States v. Baynes,* 400 F.Supp. 285, aff'd. 517 F.2d 1399 (3 Cir., 1975). It has also been held that, in order to show voluntary consent, it is not necessary to make the showing that would be required to show consent to a search; it is only necessary to show that the caller proceeded after knowing "what the law officers were about." *United States v. Bonanno,* 487 F.2d 654 (2 Cir., 1973).

The question resolves itself into one of credibility and resolution of conflicts. Since it does, we must defer to the superior position of the trial judge. *State v. Osborn,* 263 Ark. 554, 566 SW2d 139; *Whitmore v. State,* 263 Ark. 419, 565 SW 2d 133; *Horton v. State,* 262 Ark. 211, 555 SW2d 266.

We now turn to the question of admissibility of certain firearms, some marijuana and money seized as a result of a search, pursuant to a warrant issued by a municipal judge upon the affidavit of Detective Yates. At the outset, we reject appellant's contention that the trial court erred in placing the burden of showing that the warrant was improperly issued upon her. Appellant relies upon *Lunsford v. State,* 262 Ark. 1, 552 SW2d 646. In that case, we held that the state bore the burden of establishing that a search warrant was issued in compliance with the law by producing the required written evidence relied upon by the issuing magistrate as establishing probable cause. The decision in *Lunsford* was based upon our decision in *Russ v. City of Camden,* 256 Ark. 214, 506 SW2d 529. In *Russ,* we simply held that, in order that the accused might have the opportunity to assail the validity of a warrant upon which the state seeks to justify a search and the affidavit upon which the warrant was based, the state has the burden or responsibility of producing the warrant and affidavit or to follow approved procedure for establishing their contents. This is necessary because the issuance of the warrant is not an adversary proceeding and the accused may have never seen either the warrant or the affidavit, whose validity he may attack on a motion to suppress evidence seized. When the warrant and affidavit appear to be facially valid, there is a presumption that everything essential to the issuance of the warrant has been done. *Albright v. Karston,* 206 Ark. 307, 176 SW2d 421. The burden of showing the invalidity of the warrant and its supporting documents was upon appellant. *Prichard v. State,* 258 Ark. 151, 523 SW2d 194.

Appellant states that the sufficiency of the affidavit is

the only issue. She says that there were these deficiencies in the affidavit:

1. The statements by Rhodes and Bruce were hearsay because neither were under oath before the judicial officer who issued the warrant, but the affidavit contained nothing to show their reliability or the reliability of the information they gave.

2. There was nothing in the affidavit to identify the voice on the tape recording of the telephone conversation as that of appellant.

3. The source or reliability of Yates' statement that he had, during the course of his investigations, received information that appellant was then active in the drug traffic in Ft. Smith, and the statement itself was conclusory.

4. There was no statement of the underlying facts and circumstances from which the judicial officers could determine that the objects of the search were where the informants said they were.

5. The affidavit does not reveal that affiant speaks with personal knowledge of the matter contained therein, that is: whether he personally observed Bruce call anyone; the identity of the person who identified appellant as the person called, the telephone number called and the address given as the residence of appellant.

Of course, since appellant had the burden of showing the invalidity of the search warrant, any statement of fact, made as such, in the affidavit must be taken to be within the personal knowledge of the affiant, unless the contrary is shown.

The affidavit contains a statement that Bruce called Schneider at 782-2459 and she stated that she had a quantity of marijuana that she would sell him at 6:30 p.m., that the call was recorded and the tape was attached to the affidavit as an exhibit. Yates testified that the judge listened to the tape before issuing the warrant. Yates also testified that he had recognized appellant's voice on the tape.

The statement that Yates had received information that appellant was currently active in the drug traffic seems to us to be no more than background for the information he obtained from Rhodes and Bruce. This information given by them was sufficient basis on which a magistrate might reasonably believe that there would be marijuana at appellant's house at 1800 S. 16th Street in Ft. Smith. The source of information about the house and the address was identified in the supporting papers. A statement given by Rhodes to the prosecuting attorney was attached to the affidavit as an exhibit. Yates stated in his affidavit that this statement to the prosecuting attorney was made under oath.

The reliance of Yates and the municipal judge on the statement of Rhodes under oath was justified. In his statement, Rhodes stated that, on 10 or 12 different occasions over a period of months, the last of which was only two days prior to his statement, he had obtained marijuana from Ms. Schneider without paying her, sold it and then took her the money he received for it. He also said that he knew that two others had been arrested while in possession of marijuana furnished them by appellant. The incriminating nature of this statement was a sufficient basis for finding it reliable. *State v. Lechner,* 262 Ark. 401, 557 SW2d

195; *Baxter v. State,* 262 Ark. 303, 556 SW2d 428; *Maxwell v. State,* 259 Ark. 86, 531 SW2d 468.

It is true that the prosecuting attorney advised appellant's attorney about one week prior to the hearing on the petition for revocation that Rhodes had stated in an interview that his statement was in error, and while part of it had a basis of fact, the police were very liberal in writing the documents. The prosecuting attorney was unable to remember any "specifics." Four days later, the motion to suppress was filed. Two days after that, the hearing was held. Rhodes refused to testify at the hearing when his attorney invoked his privilege against self-incrimination under the Fifth Amendment to the United States Constitution. Appellant's counsel then made a proffer of answers he anticipated that Rhodes would have given if he had testified. These answers would have substantially contradicted the statement signed by him, but they cannot be taken as evidence.

It is true that the United States Supreme Court has held that a search warrant must be voided and its fruits excluded, if a defendant establishes, by a preponderance of the evidence, that a statement essential to the establishment of probable cause for a search was false and was knowingly and intentionally, or with reckless disregard for the truth, included in the affidavit. *Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed. 2d 667 (1978). Yates testified that, at the time he obtained the search warrant, there was nothing in Rhodes' statement which he knew to be untrue. Appellant did not make the required showing.

Appellant's contention that the evidence was not sufficient to support the revocation of probation must fail, in

view of our rejection of her arguments that evidence considered by the trial court should have been suppressed.

The state has relied, to some extent, upon Ark. Stat. Ann. §41-1209(3)(b) (Repl. 1977), which provides that the trial court may permit the introduction of any relevant evidence of the alleged violation of the terms of probation, regardless of its admissibility under the rules governing the admission of evidence in criminal trials. Since we have held that the search was not unreasonable, we have not considered this statute. It is true that the United States Supreme Court has not held the exclusionary rule to be applicable to probation revocation proceedings. The state also correctly points out that the court has shown a disinclination to extend the impact of the exclusionary rule. See, e.g., *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed. 2d 1067 (1976); *United States v. Janis*, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed. 2d 1046 (1976); *United States v. Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed. 2d 561 (1974). The great majority of jurisdictions that have considered the question have taken the view that evidence obtained as the result of an unreasonable search and seizure is admissible in a probation revocation hearing. See Annot. 77 ALR 3d 636, 30 ALR Fed. 824. The refusal to apply the rule in cases where the search was conducted in a good-faith reliance upon a warrant later proven defective has some appeal as an accommodation of the societal interest in requiring strict compliance with conditions of probation with the deterrence of illegal police action. We have previously indicated that the exclusionary rule might not have full impact in these proceedings. *Smith v. State*, 241 Ark. 958, 411 SW2d 510.

Since the application of the statute upon which the

state relies would involve consideration of the relation of Fourth Amendment rights, as protected by the exclusionary rules, to the validity of the statute, this question raised by the state is reserved for another day, in keeping with our rule against deciding constitutional questions when it is not necessary to the disposition of the case before us.

The judgment is affirmed.

Purtle, J., dissents.

SUPREME COURT OF ARKANSAS

No. CR 80-52

DIANNA SCHNEIDER,

Appellant,

VS.

STATE OF ARKANSAS,

Appellee.

Opinion Delivered June 16, 1980

DISSENTING OPINION

JOHN I. PURTLE, *Associate Justice*

I cannot agree with the majority on the basis of this opinion. There was probably ample evidence other than the telephone conversation and the fruits of the search to permit the court to revoke the suspended sentence. However, I would exclude the fruits of the search beause the warrant does not measure up to the requirements of the constitution or our rules.

The affidavit for the search warrant is absolutely void of personal knowledge on the part of the affiant. It consists of hearsay, conclusions, rumors, and bits of history about the appellant. There was no proven reliability of the informants; in fact, they had never been used by this officer or any other officer, as far as it can be determined from the record.

We should hold the exclusionary provisions of the Fourth Amendment to the United States Constitution do not apply in cases relating to revocation of probation, or we should reverse and remand the case for further consideration.

APPENDIX "B"

AFFIDAVIT FOR SEARCH WARRANT

Comes now Glenn Yates and being duly sworn states upon oath:

My name is Glenn Yates and I am a detective with the Narcotics Division of the Ft. Smith Police Department. I have been employed by the Ft. Smith Police Department for a period of four years. In this capacity with the department I have participated in and directed numerous under-cover investigations of illegal narcotics traffic in Fort Smith, Arkansas, using under-cover police officers, informants, surveillance and other investigative techniques. I have worked in cooperation with the local, state and federal drug agencies and from all of this I have gained a good working knowledge of the illegal drug traffic in Ft. Smith, Arkansas. I have maintained an intelligence file from all of these investigations which describes known suspects and their method of operation in dealing in drugs. I have also maintained a file on informants and their credibility.

During the course of my investigations I have received information that Dian Schneider is currently active in the drug traffic in Ft. Smith. I have checked court records and know that she was placed on five years probation for dealing drugs on January 25, 1977.

On February 3, 1979 (today) I spoke with William Rhodes and Phillip Bruce. Attached is a statement signed by Rhodes and which he stated to Prosecuting Attorney Ron Fields under oath that all the facts contained therein were true. (See attached statement Appendix "A" [to this document]). Also on this date Phillip Bruce called Schnei-

der at 782-2459 and she stated that she had a quantity of marijuana that she would sell to him at 6:30 p.m. this date. This call was recorded and the tape is attached as Appendix "B".

Bruce stated that the buy was to take place at her house (1800 S. 16th, Ft. Smith).

Wherefore, the affiant believes that a quantity of marijuana is presently being concealed at 1800 S. 16th and is being actively sold, and prays that a warrant issue for the search of the residence tonight.

_____

Affiant

subscribed and sworn to before me this ——— day of Feb.

_____

Judge

APPENDIX "A" TO AFFIDAVIT

DATE: 2-3-79
TIME: 6:00 p.m.
PLACE:

You have a right to remain silent, the Constitution requires that I so inform you of this right and you need not talk to me if you do not wish to do so. You do not have to answer any of my questions.

Should you talk to me, anything which you might say in answer to my questions "can and will" be introduced into evidence in Court against you.

If you want an attorney to be present at this time or anytime hereafter, you are entitled to such counsel. If you

cannot afford to pay counsel, we will furnish you with counsel if you so desire; otherwise, I will no longer be able to talk to you.

I, William Rhodes, have read the above three paragraphs and they have been read to me by Robert Brooks. I am 18 years of age. My address is 2008 N. 46th Terrace. After being duly warned by Robert Brooks who has identified himself as ASP.

I make the following statement and hereby declare that the following statement is made of my own free will without promise of hope or reward, without fear or threat of physical harm, without coercion, favor or offer of favor, without leniency or offer of leniency by any person or persons whomsoever.

Approx two months ago I went the house of Dian Schneider and received a quanity of Coloumbia Gold (Marihuana), I did not pay her any money for this, it was fronted to me to be resold. Along with me was Plillip Bruce as far as I know he did not pay her any thing for this Marihuana either. About three days later I took her $240.00 for the drugs I had received. To the best of my memory I made about ten or twelve trips to her house of this nature and each time I returned later and payed her for the Marihuana received.

Last summer Dian Scheider was living across from Ramsey Jr. High School in some apartments, and I know that she had fronted and sold several pounds of Marihuana to Allen Mansell and Ray Strickland, I also know that both Mansell and Strickland were arrested with Marihuana that Dian had furnished to them.

I know from my own personnal knowledge that Dian Schneider has been dealing drugs for the past ten months, I know this because I have bought from her myself and have been fronted drugs by her, also several of my friends have done the same.

Phillip Bruc told me that Dian's sister, Kay Morris had called him and told him that she was Dian's connection for her drugs and that she wanted him opinion on the quality of some drugs that she had sold to Dian. She did this because she had heard Phillip had said the Marihuana was no good. The last time I saw Dian Schneider was about two days ago, this was when Phillip and I took some Marihuan back to her because she was getting some better stuff.

I have read this statement consisting of 1 page(s) and I affirm to the truth and accuracy of the facts contained therein.

This statement was completed at 6:12 PM, on the 3 day of Feb. 1979.

/s/ William Rhodes
Signature of person giving voluntary statement

WITNESS: ?????
WITNESS: /s/ Robert G. Brooks, A.S.P.

NO. 80-542

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1980

DIANNA SCHNEIDER

Petitioner

VS.

STATE OF ARKANSAS

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

STEVE CLARK
Attorney General of Arkansas

By: JACK W. DICKERSON
Assistant Attorney General
Justice Building
Little Rock, Arkansas 72201
(501) 371-2007

Attorneys for Respondent

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NO. 80-542

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OCTOBER TERM, 1980

DIANNA SCHNEIDER

Petitioner

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STATE OF ARKANSAS

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ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

QUESTION PRESENTED FOR REVIEW

WHETHER IN STATE COURT REVOCATION OF PROBATION PROCEEDINGS IT IS PERMISSIBLE FOR THE STATE TO ADMIT EVIDENCE SEIZED PURSUANT TO A VALD SEARCH WARRANT (ALLEGED HERE TO BE INVALID) IN SUPPORT OF ITS PETITION TO REVOKE PROBATION.

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OPINION BELOW

The opinion of the Arkansas Supreme Court is found at 269 Ark. 245, 599 SW2d 730 (1980), and is reproduced in the appendix to the Petition for Writ of Certiorari at page A-1.

JURISDICTION

The petitioner relies upon 28 U.S.C. §1257(3) as the basis for this Court's jurisdiction. That section provides discretionary review by this Court, "where the validity of a State statute is drawn in question on the grounds of its being repugnant to the Constitution . . . of the United States." This Court has held that where the issue raised on certiorari has not been previously presented to, or decided by the State Supreme Court, the Court is without jurisdiction to review the issue on certiorari. *Raley v. Ohio,* 360 U.S. 423, 436 (1959); *Congress of Industrial Organizations v. McAdry,* 325 U.S. 472, 477 (1944).

In the present case, petitioner did not raise the alleged unconstitutionality of *Ark. Stat. Ann.* §41-1209(3)(b) (Repl. 1977) in her appeal to the Arkansas Supreme Court, raising rather the admissibility and sufficiency of evidence presented at her revocation hearing. Since the State Court resolved these issues against petitioner, it specifically stated that it did not address the issue raised herein. Since the State Court did not decide the issue raised here, jurisdiction for certiorari does not lie.

CONSTITUTIONAL PROVISIONS INVOLVED

The petitioner has adequately set forth the constitutional provisions involved.

STATEMENT OF THE CASE

On January 25, 1977, the petitioner pled nolo contendere to possession of heroin, amphetamines, and marijuana with the intent to deliver. She was sentenced to five years probation. On February 5, 1979, the State filed a petition to revoke petitioner's probation contending: that petitioner had committed the offense of possession of marijuana; that during her probation period petitioner had actively engaged in the selling of marijuana and other illicit drugs; and that she had committed the offense of felon in possession of a firearm.

At petitioner's revocation hearing, the State admitted evidence seized pursuant to a valid search warrant for the search of petitioner's house. The court hearing the revocation petition specifically upheld the validity of the search warrant. Petitioner appealed that finding alleging that the search warrant was in violation of a State procedural rule. She did not allege at that time that the search was conducted in violation of the *Fourth Amendment to the United States Constitution.* Nor did she challenge the constitutionality of *Ark. Stat. Ann.* §41-1209(3)(b) (Repl. 1977), which allows the admissibility of relevant evidence in probation revocation proceedings regardless of its admissibility in a criminal trial.

On appeal, the Arkansas Supreme Court found that the search warrant was valid and proper and therefore found it unnecessary to address the issue of the constitutionality of §41-1209(3)(b). In her pettion for certiorari, petitioner is asking this Court to review a decision not reached by the Arkansas Supreme Court.

REASONS FOR DENYING THE WRIT

Numerous reasons exist for this Court to refuse to review the issue raised in Dianna Schneider's petition. It is noted in *Rule* 17 *of the Rules of the Supreme Court* that a review on a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Rule 17(1) goes on to set out the general considerations governing review of state court decisions as follows:

> (b) when a state court of last resort *has decided* a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) when a state court . . . *has decided* an important question of federal law which has not been, but should be, settled by this Court, or *has decided* a federal question in a way in conflict with applicable decisions of this Court.

(Emphasis added.)

The *decision* which petitioner asks the Court to review is one which has not yet been made. The Arkansas Supreme Court specifically declined to address the constitutionality of §41-1209(3)(b) because the evidence admitted at petitioner's revocation hearing was legally seized pursuant to a valid search warrant. (See the Court's decision at pages A-9, A-10 of petitioner's brief.) The petitioner does not seriously contest this finding on admissibility of the evidence, but rather, merely tells the Court that "it will have no problem" circumventing the State's Court ruling on admissibility of the evidence, if the Court deems that

necessary to resolve the issue raised in his petition. (Her brief page 6) Although this contention may be correct, for practical purposes, it better shows the reasons why this Court should deny certiorari.

Special and important reasons require that certiorari be granted. *Fay v. Noia,* 372 U.S. 391 (1963). Special and important reasons are those which reach issues of constitutional dimensions, *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70 (1955), and which present a *real not a fictitious,* federal issue. *Quong Ham Wah Co. v. Industrial Acc. Commission,* 255 U.S. 445 (1921).

A probation revocation proceeding is administrative in nature. It is not an adversarial proceeding, being neither a civil action nor a criminal prosecution. *U.S. ex rel. Lombardino v. Heyd,* 318 F. Supp. 648, 652 (E.D. La. 1970), *aff'd,* 438 F.2d 1027 (5th Cir. 1970), *cert. denied,* 404 U.S. 880 (1971).

It has not been the practice of the Federal courts to concern themselves with areas which have traditionally been matters of State concern. *See, Morrissey v. Brewer,* 443 F.2d 942, *cert. denied,* 404 U.S. 999 (1971). Respondent submits that administrative procedures are matters of State concern and are not proper considerations of this Court.

Petitioner had previously been found guilty of a felony so the criminal prosecution was completed. *Frad v. Kelley,* 302 U.S. 312 (1937). Her guilty verdict is not at issue here, only the revocation of her probated sentence, an issue this Court has previously refused to entertain. *Lombardino, supra.*

If petitioner's petition is granted, she will be asking the Court to rule that the exclusionary rule is applicable to

probation revocation hearings. Federal courts have consistently refused to apply this judicially created rule to federal probation revocation proceedings. See, *Grogan v. United States*, 262 F.2d 78 (5th Cir. 1958); *United States v. Brown*, 488 F.2d 94 (5th Cir. 1973); *United States v. Farmer*, 512 F.2d 160 (6th Cir. 1975), *cert. denied*, 423 U.S. 987 (1975); *U.S. ex rel Lombardino v. Heyd*, 318 F. Supp. 648, *aff'd*, 438 F.2d 1027 (5th Cir. 1970), *cert. denied*, 404 U.S. 880; *United States v. Hill*, 447 F.2d 817 (7th Cir. 1971); *United States v. Winsett*, 518 F.2d 51 (9th Cir. 1975); *United States v. Vandemark*, 522 F.2d 1019 (9th Cir. 1975); *United States v. Wiygul*, 578 F.2d 577 (5th Cir. 1978).

These cases reason that since the avowed purpose of the exclusionary rule is to deter police misconduct, *Elkins v. United States*, 364 U.S. 206 (1960), the maximum deterrent purpose is achieved by excluding the evidence from the *criminal prosecution*. Any deterrent effect which might be achieved by excluding the evidence from probation revocation hearings would be minimum. See, *Harris v. New York*, 401 U.S. 222 (1971), where this Court said:

> Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution *in its case in chief*.

(Emphasis added) 401 U.S. at 225.

Since the exclusionary rule prevents the use of good reliable evidence, allowing the guilty to go free, minimum (if not non-existent) deterrence does not justify the exclusion of reliable evidence from the revocation proceeding.

The federal courts have balanced the potential benefits

of thus expanding the exclusionary rule against the potential injury to the functioning of probation revocation proceedings, and have found the injury to outweigh the benefits. Since the purpose of probation is to promote the rehabilitation of the criminal, allowing him to re-integrate into society, it is of utmost importance for the courts to be allowed to consider all reliable evidence to determine whether probation requirements are complied with. Failure to meet those conditions may indicate that the probationer is incapable of rehabilitation by integration.

This was the case in petitioner's case. Convicted for selling controlled substances, the State in its grace, placed her on probation hoping to accomplish rehabilitation. Petitioner capitalized on this misplaced leniency by continuing her illicit trade.

The federal courts have provided an exception to the general rule that illegally seized evidence is admissible at revocation hearings. If the evidence seized results from police harassment or intentional police misconduct aimed at creating a probation revocation, the evidence will not be admitted. See, *e.g.*, *United States v. Rushlow*, 385 F. Supp. 795 (D.C. Cal. 1974); *cert. denied*, 429 U.S. 984 (1976), *aff'd*, 541 F.2d 287 (1976).

Although certiorari may be granted on this issue in a proper case, this is not such a case. In the petitioner's case legally seized evidence was admitted rather than evidence seized in violation of the constitution. Here no bad faith or illegality on behalf of the law enforcement authorities is alleged or proven. Rather, the police concientiously sought to comply with the warrant requirement of the Fourth Amendment and the Supreme Court of Arkansas has found that the warrant was properly obtained and executed. This

is *not* a case when police authorities flaunted the Fourth Amendment's mandate, secure in the knowledge that the fruit of this action would nonetheless be admissible.

This Court has shown a disinclination to extend the impact of the exclusionary rule. *Stone v. Powell,* 428 U.S. 465 (1976); *United States v. Janis,* 428 U.S. 433 (1976); *United States v. Calandra,* 414 U.S. 338 (1974). This is not the type of case which will justify further expansion of the rule.

CONCLUSION

This Court should not grant certiorari to review an issue not first addressed to, or decided by the State Supreme Court. Petitioner should not be allowed to anticipate how the State Court *would* rule on the issue if properly raised and then argue that this hypothetical ruling is in conflict with established rulings of other states.

The scope of the exclusionary rule should not be expanded to include probation revocation. The facts of the instant case certainly do not justify such an expansion.

Respectfully submitted,

STEVE CLARK
Attorney General of Arkansas

By: JACK W. DICKERSON
Assistant Attorney General
Justice Building
Little Rock, Arkansas 72201
(501) 371-2007

Attorneys for Respondent